In the United States

Circuit Court of Appeals

For the Ninth Circuit

JAMES T. BARRON, Appellant, vs. CLAIRE J. ALEXANDER, Appellee.	NO. 2171

Upon Appeal From the United States District Court
For the District of Alaska,
Division No. 1.

Reply Brief of Appellant

JNO. R. WINN and
N. L. BURTON,
Attorneys for Appellant.

REPLY BRIEF OF APPELLANT.

The motion of appellant, supported by the affidavit of Z. R. Cheney, to strike the affidavit of Jno. R. Winn from the files and records in this case, was served on our Mr. Burton, in Juneau, Alaska, on the date mentioned in the admission of service on the back of same, and our Mr. Winn was absent in the East at that time and did not return to Juneau or receive the motion and affidavit of Mr. Cheney until after the oral argument was made and the brief in chief of appellee filed herein, hence, this is the first opportunity that we have had to state our views upon and in relation to this motion and affidavit.

The record does not show that the affidavit moved against was ever served. It does appear, however, from said affidavit of Z. R. Cheney, that both he and Mr. Jennings, who were counsel of record for defendant, at the time were absent from the town of Juneau, one being in Fairbanks, Alaska, and the other in Baltimore, Maryland. No other attorney had been substituted for these two attorneys of appellee, hence, there was no attorney nearer than Fairbanks, Alaska, or Baltimore, Maryland, upon whom legal service could be made at the time of filing this affidavit of Jno. R. Winn.

The affidavit which is moved against is found in V. 1, p. 718 of the record. On the 19th day of November, this year, we were handed, by counsel for appellee, a copy of an affidavit by Alexander, which said affidavit is intended to bolster up Cheney's affidavit. We are of the opinion that it is too late now for the appellee to file any affidavits for the purpose in question, but in case that this honorable Court is of the opinion that it is not too late for the filing of this Alexander affidavit, we tender herewith, and wish to have filed, the affidavits of Lloyd G. Hill, Captain E. Thornton and Charles Carlson, covering the matters set out in the affidavits of Cheney and Alexander. The affidavit of Hill was made and served on counsel for appellee before the oral argument was made in this case before this honorable Court, but our Mr. Winn had not at that time received the same on account of his absence from Juneau, as hereinabove stated, and this is the reason for not tendering it for filing until now.

It is not contended in either of the affidavits of appellee that any portion of the said affidavit of Jno. R. Winn is untrue, except the following portion: "When we arrived at the fish trap location of appellant, referred to in the complaint herein, the said defendant******had destroyed the evidence and manner in which the fish trap described and set up in the complaint was constructed." This seems to be the only objectionable feature to the affidavit in question, except, perhaps, the further statement contained therein, to-wit: "Alexander had

partially constructed another fish trap directly in front of appellant's upland property," and in regard to this last clause of the affidavit, there is no question but what it is true, for the court has so stated in its written opinion and the order made herein over-ruling the motion for a new trial, that is, unquestionably a new lead to the fish trap had been constructed in front of Barron's property. Cheney in his own affidavit above referred to, states as follows, referring to the time of the visit by the Court to the premises: *"Alexander had torn down only a part of the body of said fish trap and had constructed a new lead line pointing in the direction, etc."*

This affidavit of Jno. R. Winn was filed, not so much in support of the motion for a new trial, as it was to show under what circumstances the trial Judge visited the premises. We do not know whether the facts set up therein amount to a great deal or not, for the reason that it appears conclusively from the record that there had been a change in the fish trap structure between the time of the trial of the case and the visit of the Court to the premises; and these several affidavits could only enlarge and add to the record in this respect, and tend to show the *mala fides* of the appellee in destroying the physical condition and situs of the fish trap, which formed the issue in the case, and upon which evidence was introduced in support thereof, thus defeating the very object of the trial Court's visit to the premises, viz: to see those things which were

in issue and had been testified concerning, and for the purpose of better enabling the Court to understand and apply the evidence which had been submitted to it upon the trial of the case. Alexander did this in face of the fact that he knew that the Court expected to make this visit for the purpose above indicated. (See Alexander's affidavit filed in support of the motion to strike.) Appellant's affidavits tendered herewith, and the facts contained therein, tend to give great weight to what we have already argued in our brief in chief, that is: *That the Court's final judgment and decision herein was rendered concerning another and different fish trap than the one set up in the amended and supplemental complaint. Or that the change in the condition of the structure brought about by Alexander, and as seen by the Court, had great weight with the Court in arriving at its final decision and judgment herein.* However, irrespective of these affidavits, we have stated, it clearly appears from the opinion of the Court, and its order over-ruling the motion for new trial, that the changes complained of, or at least part of them, were made by appellee between the time of the trial of the case and the visit of the Court to the premises. For the purposes above indicated, we hope that this honorable Court will see its way clear to receive these several affidavits, and to give them such consideration and weight as they are entitled to. If they are received, we have clearly shown by them that the facts set up in the affidavit of Jno. R. Winn, which is moved against, are abso-

lutely true, instead of, as stated in the affidavits of Cheney and Alexander, "absolutely false."

The Lloyd G. Hill, who has signed one of th affidavits tendered, is the same Lloyd G. Hill who testified on the trial of this case, and who made exhibit "D," which is referred to in his affidavit; and it will be gathered from the record that he is very familiar with the matters in dispute in this case. Captain E. Thornton and Charles Carlson, who signed the other affidavit, were both witnesses on the part of the plaintiff upon the trial of the case in chief, and were, and are, very familiar with the facts set forth in their affidavit. Surely the affidavits of these three disinterested parties should have greater weight with the Court than the affidavit of appellee and his counsel.

We will now proceed to reply to appellee's brief, and will follow the same order, as near as possible and practicable, that he thas taken up and discussed the various points from his view of the case.

Counsel for appellee in his statement of facts or argument in nowise contradicts the statement of facts made by appellant as to the time and manner of initiation of appellant's right to the upland property bordering upon the fish trap location, that is: That V. A. Robertson took up the land contained in U. S. Survey No. 804, abutting upon the fish trap location, on October 31st, 1908, and on the 6th day of July, 1909, the survey, field notes, etc., were approved by the Surveyor General of the District of Alaska, and that the Court found on the trial of

the case that Barron was the owner of the upland; and further, that by reason of the doctrine of relation laid down in N. W. Fisheries Co., 39 L. D., p. 398, Barron's title dates back to June 6th, 1909. From a perusal by the Court of the statement of the case made by appellant and appellees, we think that it will be found that appellant's statement is full and complete, and the facts therein contained substantiated by the evidence.

Counsel states that this court will not reverse or set aside the findings of fact made by the Court unless:

a. "Some serious or important mistake has been made in the consideration of the evidence," and

b. "An obvious error has intervened in the application of the law."

We have no particular fault to find with these two propositions of law or the authorities cited in support thereof. It is our contention, and we spent considerable amount of energy in our brief in chief upon these two very same propositions of law, that the Court erred in respect to the same. In the first place, the Court made "a serious and important mistake" in taking into consideration the change that had been made in the fish trap and rendering its judgment upon the conditions as seen by it, or being unduly influenced by the same in arriving at its final decision. Secondly: "*An obvious error HAS INTERVENED in the application of the law,*" *for it*

clearly appears from the records in the case, and from what we have set forth in our brief in chief, that the Court misapplied the doctrine and force and effect of certain authorities to the case at bar; that is, the Court applied to the case at bar the principle and doctrine laid down in certain cases wherein the rights of the public, or trade and commerce, to the use of navigable waters for certain purposes are paramount rights to those of an upland owner to the use of his entire water frontage and access from every foot thereof to the same. This doctrine, we contend, does not apply to the case at bar for the reasons, as hereinbefore stated, that this suit is between two private individuals, and does not pertain to any question as to the use of navigable waters by the public, or for trade, commerce or navigation.

Appellee (pp. 5 and 6 of his brief) correctly quotes a portion of the testimony of certain witnesses of the appellant, but on pages 7 and 8 of his brief draws what we deem some very erroneous conclusions from the testimony, as well as fails to state the facts as testified by the witnesses. For instance, counsel states: "That the testimony of appellant's witnesses, taken in connection with certain photographs and Exhibit "D," being Hill's map, (P. R. 164)*****show that there are eight feet of water at low tide at the pile in the lead of said trap nearest the shore, etc." There is no evidence or testimony of any kind in this case to support counsel's assertion. All of the witnesses, who testified upon this subject, testified differently from counsel's

statement, and stated that the depth of water at extreme low tide ranged from 1 to 4.9 feet at said place. We say, without fear of contradiction, that the following testimony and evidence IS ALL OF THE TESTIMONY AND EVIDENCE UPON THIS POINT. We do not care to burden this Court with repetitions of matters in our reply brief, but as the record is long and lengthy, we desire to assist the Court as much as possible in getting at the real facts of the case by the shortest method, and we will quote *all* of the testimony of *all* of the witnesses in respect to this matter.

The witness Hill testifies (V. 1, P. R., pp. 158 and 159) as follows:

"Q. The soundings as marked on this map or plat (referring to appellant's Exhibit "D" (P. R. 164) are just as you found them upon the ground, or are they different?

"A. Just as I found them at that time.

"Q. Yes, now, this was what day,—the 11th of March?

"A. Yes, sir.

"Q. What depth of water did you find at the pile nearest the shore in the lead of the trap?

"A. Eight feet. Is marked on the plat.

"Q. What stage of the tide was it when you were there, Mr. Hill?

"A. Why, the tides according to the tide table would be out, I think, at 1:50 in the afternoon, the low tide, and I started making sound-

ings about 12:30. I completed them about one o'clock; so it wasn't quite—wasn't quite low tide.

"Q. Yes, now, do you know from an examination of the tide books as to whether or not the tide at that time of the month is less or greater than it is at other times of the same month? Have you examined the tide tables, and so forth, to ascertain that?

"A. Why, the tide——they were very short run-outs; not a low tide. The tide could be much lower. Take the June tides will probably run out 6 feet lower than the March tides.

"Q. Taking then at the lowest tides, approximately, would leave about how much water or depth of water where that last pile is in the lead, that is, approximately, without calculating it?

"A. Why, wouldn't be over two feet of water there at the very lowest tide.

"Q. Well, ordinary low tide?

"A. Ordinary low tide, probably be four or five feet."

Captain Thornton testifies (pp. 434 and 435 P. R.) that if Hill's testimony is true, as above quoted, and that the depth of water at the pile nearest the shore was 8 feet on March 11, 1912, (being the day that Hill made Exhibit "D," and his measurements) that *at extreme low tides* that it would make it less than *one foot* depth of water at the pile in Alexander's lead nearest the shore or upland of Barron.

Barron testifies (P. R. 222) as follows:

"Q. I did ask you if there was any chance, Mr. Barron, even though there was no web ever strung between that last pile and the upland, for any size of gasoline boats, or any other boats, to navigate between the upland and that pile at ordinary low tide?

"A. No; a small gasoline boat could not go there. Three big boulders there, probably three or four feet along, high; they entirely close up in between, entirely; along the shore line might get a depth of, say, four or five feet and get on top of a boulder and you would have three or four feet less of water.

"Q. I understand. When you was out there at ordinary low tide that was entirely closed up from that pile clear on up to the ordinary line of high tide. A. Yes.

"Q. No chance of getting through there unless you run through his trap? A. No."

Birkinbine, appellee's surveyor and expert witness, testifies at pp. 557 and 558, P. R., in reference to this matter and his map and plat, which is found at P. R. 549, as follows:

"Q. Now, I will ask you, Mr. Birkinbine, what is the depth of the water represented by these figures at the last lead pile inshore of Alexander's trap, as it now stands according to your map?

"A. This is marked "minus 4.9" which means 4.9 feet below extreme tide.

"Q. That is the depth of the water as you found it at the last pile toward the shore of the trap?

"A. Yes, sir.

"Q. As it was on that date? A. Yes, sir.

"Q. (By the Court) That is the extreme low tide?

"A. That is the extreme low tide; yes, sir. I have assumed extreme low tide to be zero.

"Q. (By Mr. Cheney) Now, that—is that map made on the same scale as Mr. Hill's map?

"A. Yes; 100 feet to the inch. That is it.

"Mr. Hill. Yes, sir.

"Q. (By Mr. Cheney Now, if there is any difference in these two maps—I am not speaking of the tides now, but in respect to any other matters affecting the contour of the shore in front of this homestead or off here to the left where the "A" is marked and the—and the rock with the little circle in the center, please explain to the Court what the difference is between your map and Mr. Hill's?

"A. Why, Mr. Hill, I think, shows the—a tide line about at this—about this line; that is the lowest one he shows is about what I call the average low tide.

"Q. Just a moment. Let's get his map here so you can explain better.

"A. Yes; we get a little different shape to the end of the reef here and we get a different position for this—for this that is called end of

rock, "bare rock," which Mr. Hill calls it the end of the peninsula, and we get a little different position for the reef."

We wish also to call the Court's attention to Birkinbine's map (p. 549, P. R.) where it shows that he has marked thereon that at low tide the water would be 4.9 feet deep at the last pile in the lead of the trap nearest Barron's upland.

The foregoing being the testimony, *and all of the facts*, concerning the depth of water at this pile nearest the shore, we would like to ask what foundation has counsel for appellee, in referring to the evidence on this point, to state "It shows that there are 8 feet of water at low tide at the pile in the lead of said trap nearest the shore."

Barron, Thornton and Hill, on the part of appellant, and Birkinbine, on the part of appellee, refute the statement of counsel.

Again, we contend that it is a conceded fact in the case that there was a strong wire cable strung from the last pile in the lead nearest the shore in a straight line with the lead of the trap and securely fastened on the upland of Barron and web hung thereon in order to complete the lead. That this cable, so hung, constituted a part of the trap and it was just as formidable in obstructing Barron's access to his upland as that part of the lead of the trap made by the driven piles and web hung thereon. The witness Dudley states (p. 134, P. R.) that this cable extended over the tide lands from the last pile in the lead of the trap to Barron's upland,

or above high water mark. Mason testifies substantially the same as Dudley. (pp. 360 and 361, P. R.) Barron makes the same statement. (p. 206, P. R.) Last, but not least, Alexander, defendant and appellee, admits that the lead went above low water mark. (pp. 468 and 469, P. R.) *This being true, what becomes of appellee's THEORY that he had left unobstructed the navigable waters lying between the last pile in the lead and Barrow's upland?* In the face of these facts, we may also ask what becomes of the fine spun mathematical calculation of appellee's counsel, as a result of which he finds:

> *"The actual average depth of waters at the lead line nearest the shore of appellee's fish trap was* 19.045 *feet,, and that during June,* 1912, *it was* 15 *feet.* (P. 7, Appellee's Brief); and the other assertion made by counsel (p. 13, his brief), to-wit: "I have shown on page 7 of this brief, there is over 19 feet of water at the lead pile at average sea level."

Counsel continues in his argument, (p. 8 of his brief):

> *"Plaintiff's exhibit "D," as well as defendant's exhibit* 4, *directly contradicts the oral testimony of appellant and his witnesses upon the question of access to the uplands*********"

Photographic evidence is considered in law very uncertain and unreliable proof. Maps and plats show nothing except as illustrative of facts testified

to. The photographs referred to are so unreliable that they make the straight timbers lying upon the shore crooked, some of them describing a semi-circle. We have never heard of a method of photography that would disclose the condition of the bottom of the sea, under water, nor have we ever known of a map or plat by which, in the absence of soundings, etc., one could determine whether a particular body of water is navigable or not. Much less, could these exhibits demonstrate the fact as to whether or not Barron's right of way out to navigable water had been obstructed by Alexander's fish trap. Could these poor mute maps and photographs furnish expert testimony as to whether or not certain steamers or water-crafts could safely be piloted into Barron's land with Alexander's fish trap in place? The matter of navigation we contend is a science, and as to whether or not water-crafts could safely reach Barron's upland with the fish trap in place is a matter of proof by testimony of expert witnesses such as Mason, Thornton, Carlson and Barron, all of whom testified in this case, as against counsel's contention and against the silent photographs and plats referred to by him, if they show what he contends they do. Nor could Birkinbine, leisurely walking along the shore in front of Barron's property, with his surveying instrument on his shoulder, determine as to whether or not boats could be landed and Barron's land reached from the waters on the east side of the trap, nor could his parade in any wise contradict the positive testimony

of Mason, Thornton, Carlson and Barron to the effect that this fish trap cuts off Barron's access to his upland and leaves no suitable place for Barron's gateway out to the seas. Birkinbine testifies that he made no soundings on the east side of the trap, so he did not know the depth of water nor the condition of the bottom of the sea in that respect. (P. R. 625) also first brief p. 62.)

As stated in our brief in chief, (p. 77) the uncantradicted proof in this case clearly shows that the only reasonable, feasible and practicable place for landing of steamers or water-craft has been entirely destroyed and cut off from Barron's upland by Alexander's structure, and as we have shown there, even the *defendant* admits that he had obstructed from 200 to 600 feet of Barron's shore land and in his own language states "*at the most natural place for landing of boats.*" (P. R. 471.)

The answering brief of appellee in nowise denies these matters that we so cogently urged in our brief in chief. And right here we would like to state that it will further appear from the record (V. II., p. 294) that the Trial Judge evidently took the view that notwithstanding that we could show that the "*only feasible and practicable*" entrance to the upland of appellant was obstructed by the fish trap, that appellant has no remedy unless he was going to use such access; in other words, that this littoral right must be exercised before it is available, clearly indicating that the right did not exist as "property" but unless appellant was ready to use such right,

some stranger could come in and take it away from him and an injunction could not be sustained unless immediate use of such littoral right could be shown. The Trial Judge indicated as much when we were endeavoring to show that the only reasonable place for reaching appellant's land from the water had been obstructed by the actions of appellee. However, should this be the law, we have shown beyond any question that this little sand beach, lying on the westerly side of the trap, had been used by Barron as a landing or anchoring place before Alexander came on the scene.

We do not care to reply to the authorities cited by counsel for the reason that most of them are decisions by this honorable Court and we referred to the same cases in our brief in chief, and endeavored to show the applicability or inapplicability of these cases to the case at bar, and deem any further comment unnecessary, except we may refer to the Columbia Canning Co. case further on, as the appellee seems to think that that case is on "all-fours" with the present one. Appellee's counsel, in referring to what we contend are our littoral rights, and water front privileges, says:

> "I suggest that counsel's position is unique in the history of the law concerning littoral rights."

This assertion was made by counsel in refutation of our statement in our former brief that Barron's right of way out to deep water would only control that part of the shore land and water lying

between the prolongation of the end lines of Survey No. 804. We know of nothing unique about the position we have taken in this respect. Authorities hold that in case of dispute arising between adjoining upland owners as to the waterfront that each is entitled to control, that portion which lies immediately in front of his upland, in case the shore line is straight; and in case the upland borders upon a semi-circular bay, and the above kind of division is impossible, then the court will make an equitable devision of the tide lands, etc., in front of the property owned by the respective parties; hence, we contend that in the case at bar we can only consider as to whether or not Barron's right of way in *front of his property has been obstructed.*

Counsel further states (p. 17 of his brief) as follows:

> *"However, from a perusal of the testimony upon cross-examination of P. H. Mason it does appear, at least by inference, that the appellee at the time of the trial contemplated changing the lead of the trap from the way it was then driven to the position in which the Court saw it at the time of his visit to the premises."*

Then he proceeds to quote from Mason's testimony certain questions, which appellee's counsel propounded him, and the answers thereto, in support of the statement which counsel made. Counsel for appellee talks "about astounding propositions" but all the astounding propositions, which

we have ever heard of, dwarf into insignificance when compared with the statement which counsel here makes. In other words, it is shown by all the proof in the case, and the testimony of various witnesses, which we have set forth in our brief in chief, that the appellee in the first instance, and on the hearing to dissolve the preliminary injunction granted by the Trial Court, contended, and so testified, that his trap then was complete and he could not drive piles any further inshore ,and that the reason that the fish trap and lead did not interfere with Barron's access to his upland was that there was a distance of 500 or 600 feet between the nearest inshore pile and Barron's upland. (P. R., p. 468.) That immediately upon the dissolution of the temporary restraining order, which order was based on evidence of this nature, Alexander immediately found out that he could drive further inshore, and on advice of his attorney, that he (Alexander) had as much right to the upland as Barron, the lead was extended 261 feet further inshore towards Barron's upland. (See brief in chief of appellant, p. 60.) Then upon the trial of the case in chief, Alexander testifies that that was the only place in which he could drive a lead line—that he knew this by experience that he had gained while working for the Alaska Packers' Association and driving a trap on the same location. Then, Alexander, following, as we presume, his counsel's advice, that the evidence given before the Trial Court showed that the fish trap, as then constructed, was

a nuisance to Barron, undertakes to play hocus-pocus or hide-and-go-seek with the Court, rushes out and again makes a change in the structure in question. And counsel states that they were contemplating such a change when the trial was going on before Judge Lyons! We would like to ask counsel if this is fair practice? Or if such contemplated change was a triable issue in the case, or in any manner binds the appellant by any decree that could be rendered in this case? Such contemplated change if consummated would raise a new issue, upon which another and different cause of action might be predicated.

Should this practice prevail, and we should now go to trial upon the question as to whether or not the fish trap, as *it is now* constructed,, interferes with Barron's free access to his upland, and in the middle of the trial, or after the trial, the appellee was convinced that it did, and the court was called upon to visit the premises, and, in the meantime, appellee made another change in his structure, we would continue on these trials ad infinitum. We do not think that such practice should be tolerated by the Courts.

Counsel further contends that Barron had no title to the fish trap location, save and except that which he purchased from Robertson. This is not true. It appears from the evidence that, in the first instance, Barron leased the fish trap site from the Alaska Packers' Association for the year of 1910, as they were not, at that time, willing to sell. (pp. 97, 98

and 99, P. R.) That he did not fish the location that season for the reason that Robertson owned the upland. Barron then pursued the course of buying both Robertson's upland and the fish trap location, and sometime in the arly spring of 1911, succeeded in closing the deal with Robertson for the upland and with the Alaska Packers' Association for the fish trap location. P. R., pp. 258, 309 and 310.) Barron drove some piles upon the location in 1910, and placed a notice thereon that he claimed the same. Early in the spring of 1911, Barron contemplated building upon the location for some purpose, and Alexander rushes in and commences the erection of his structure. He was immediately notified of Barron's rights in the premises by Mr. Barker, the superintendent of Barron's cannery, and saw the piles upon the ground and the notice still attached thereto, and Barker served Alexander with the notice found at page 753 of the record.

The foregoing facts, as detailed, being true, we are unable to understand that our relying upon the Statute of June 26th, 1906, (cited on page 30 of our Supplemental Brief) is, as counsel has stated, "an absurd and most astounding proposition, etc.," We do not care to reiterate out argument on this point, as we have given the Court what, in our opinion, should be the construction placed upon the Statute last mentioned.

Appellee, in his brief, has taken up several pages in quoting from some of Barron's testimony. We submit that this is only an isolated portion of the

witnessess' story, as given in court, and should be considered with all of his testimony given, and when this is done, and taken in connection with the other evidence in the case, the Court will find, as we have stated before, that Barron had been using the waters in front of his upland for anchoring purposes and as a harbor of safety before Alexander ever initiated any rights or made any claim to the fish trap location in controversy. We do not think that the *purpose* for which this ground was taken up by Barron is at all material. If he has acquired title from the Government, as the Trial Court has found, then he could and can use his property, including the tide land and water in front thereof, for whatever purposes de desires, so far as the appellee is concerned. The littoral rights attached at the time of the approval of Survey No. 804. Whether Barron used the water in front of his upland property or intends to use it, for anchoring, wharf or fish trap purposes, is no concern of the appellee.

Appellee relies on the Columbia Canning Company's case, (161 Fed., p. 60) for an affirmance of the case at bar, and contends that the cases are parallel. In our oral argument before this Court, we attempted to show the inapplicability of the doctrine laid down in the Columbia Canning Company's case to this case. Judge Morrow, speaking for the Court in the Columbia Canning Company's case says:

> "It follows from these authorities that while the owner or locator of lands in Alaska which border upon navigable or tidal waters has, un-

der the general law, the right of access to such waters for the purpose of navigation, he can acquire no right or title in the soil below high-water mark, and he can have therefore no right of possession upon which he can base an action against an intruder whom he charges with interfering with and obstructing him in the erection and use of a structure upon the shore below such high-water mark. He may have, however, a right of action against an intruder who places obstacles on the shore that prevent him from having access to the navigable waters; but that is not this case. The plaintiff does not charge that defendants' structure is a nuisance, or that the defendants are obstructing him in having access to the navigable waters of Lynn Canal. The charge is that defendants are erecting on the shore a structure of piles for a fish trap which will be an obstruction to a similar structure which the plaintiff had commenced to erect. This is not the statement of a cause of action under the general low relating to littoral rights, nor under any statute relating to the waters of Alaska to which our attention has been called." (pp. 64 and 65.)

The case at bar(leaving out the question of the Statute of June 26th, 1906) is predicated entirely

"Against an intruder who has placed an obstacle on the shore (and in the waters) that prevents the upland owner from having access to navigable waters;"

Hence, the case at bar does not come within the doctrine laid down in the Columbia Canning Company's case.

We desire to again state that the Trial Court either rendered a decision and final judgment upon the fish trap structure which Alexander rebuilt between the time of the close of the trial and the visit of the Judge to the premises in controversy, or that the Court misapplied the information gathered from such change, and was so influenced by the same, that the relief prayed for by appellant was denied. The Judge states, in his written opinion, to-wit:

> "Since the hearing of this trial, however, the Judge of this Court in company with the counsel for both the plaintiff and the defendant has had an opportunity to visit the situs of the fish trap and the tract of land described in plaintiff's complaint, and it appears that the lead line of the defendant's trap has been changed so that, instead of running in a northeasterly direction from the main part of the trap, as indicated by the exhibits offered in evidence, it now extends in a direction a little west of north from the trap, thus eliminating any possible question in the judgment of the Court of its interfering with plaintiff's right of access from every point of his upland to the navigable waters of Chatham Straits." (P. R., p. 742.)

On reading this part of the Judge's opinion, it certainly would impress any one that he had some question in his mind or some doubt in his mind con-

cerning the relief that should be grantedto appellant; that is, he thought that the structure complained of in the amended and supplemented complaint did interfere with plaintiff's right of access from every point of his upland to navigable waters; but that the new structure did not. He further says in his opinion:

> "For the reasons herein assigned this action should be dismissed." (P. R., p. 743.)

One of the reasons, then, for the dismissal of the action was "*that the lead line of the defendant's trap had been changed.*"

Then, too, in the order made by the Trial Judge in over-ruling the motion for a new trial, he states as follows:

> "The change made in the construction of the fish trap by the said defendant does not cause the same to in any wise interfere with plaintiff's free ingress from the navigable waters of Chatham Straits to his upland and all parts thereof, or free egress from his upland and all parts thereof to the navigable waters of said Chatham Straits."

In conclusion, allow us to say that the judgment and decree of the Trial Court in dismissing this action should be reversed and the relief prayed for in the amended and supplemental complaint herein granted for the following reasons, to-wit:

a. If the Statute of June 26th, 1906, cited in

our brief, applies, then we were first in time and should be first in right.

b. It conclusively appears from the evidence in said cause, *and the admission of the appellee*, that the fish trap structure, complained of in the Amended and Supplemented Complaint did obstruct and cut off appellant's ingress and egress to and from the navigable waters of Chatham Straits and his upland.

c. It conclusively appears from the evidence in said cause *and the admission of appellee* that the only practicable and feasible place upon the upland of appellant from which access to the navigable waters of Chatham Straits can be reached is directly fronted and obstructed by the fish trap structure of appellee.

d. It conclusively appears from all the evidence in said cause that any and all reasonable access to the navigable waters of Chatham Straits from the upland of appellant was cut off by the erection and construction of the fish trap of appellee, as complained of in the Amended and Supplemented Complaint.

e. It is held by the Trial Court that the appellant is the owner in fee of the upland, and the littoral rights attached to such upland, and we contend that this is such a "property right" that the appellant can not be deprived thereof.

f. That the Trial Court committed error in tak-

ing into consideration any other or different structure than the one complained of in the Amended and Supplemental Complaint, and that such consideration is reversible error.

Respectfully submitted,

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